COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2138

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DORIAN V. NEAL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Dorian V. Neal appeals from an order denying his WIS. STAT. § 974.06 (1997-98)[1] motion alleging that appellate counsel was

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

ineffective for not challenging trial counsel's failure to have a juror stricken for cause. Because we conclude that counsel was not ineffective, we affirm.

¶2 Neal was convicted of first-degree intentional homicide and two other counts after a jury trial. His convictions were affirmed on appeal after his counsel pursued a postconviction motion. Counsel did not raise any issues relating to the presence of Juror 78 on the jury panel in postconviction proceedings or on appeal. In a WIS. STAT. § 974.06 motion, Neal argued that counsel was ineffective for failing to appeal the presence of Juror 78. After an evidentiary hearing at which appellate counsel testified, the circuit court concluded that counsel did not perform deficiently and was not ineffective. Neal appeals.[2]

¶3 Counsel renders ineffective assistance if counsel performed deficiently and prejudiced the defendant. *See* ***State v. Oswald***, 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207. Whether counsel was ineffective is a mixed question of fact and law. *See* ***id.*** at ¶51. We will uphold the circuit court's

[2] Neal's complaints about counsel relate to counsel's assistance in an appellate capacity, not a postconviction capacity. Trial counsel sought to have Juror 78 stricken for cause. Because the issue was preserved in the circuit court, counsel did not have to raise it on postconviction motion. *See* WIS. STAT. § 974.02(2). Therefore, Neal actually challenges counsel's failure to brief on appeal the court's refusal to strike Juror 78. Normally, issues relating to briefing on appeal are raised in a petition for a writ of habeas corpus under ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992), in the court which heard the appeal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678-79, 556 N.W.2d 136 (Ct. App. 1996). Notwithstanding this procedural error, we will dispose of Neal's appeal even though he has employed the wrong procedure.

We further note that Neal had previous postconviction and appellate proceedings. Therefore, he was obligated to demonstrate a sufficient reason for not having raised the issues relating to Juror 78 in the previous appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 186, 517 N.W.2d 157 (1994). Neal's WIS. STAT. § 974.06 motion asserted that his appellate counsel was ineffective for not pursuing issues relating to Juror 78. This ground has been recognized as a sufficient reason for not raising an issue in earlier proceedings. *See* ***Rothering***, 205 Wis. 2d at 682. In light of the foregoing, we proceed to the merits of Neal's claim that appellate counsel was ineffective for failing to pursue issues relating to Juror 78.

findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***id.*** However, the final determinations of deficient performance and prejudice present questions of law which we decide independently of the circuit court. *See* ***id.***

¶4 Trial counsel objected to Juror 78 and sought to have her stricken for cause. The circuit court denied the motion. Neal's WIS. STAT. § 974.06 motion alleged that appellate counsel should have briefed a challenge to Juror 78. At the hearing on Neal's § 974.06 motion, appellate counsel testified that as part of his representation of Neal, he reviewed the transcript of the voir dire and concluded that Juror 78 was not biased. In counsel's opinion, the juror affirmed that she could approach the case fairly. Counsel stated that he was aware of the criteria for striking jurors for cause and that based upon his subsequent research a posttrial challenge to Juror 78 would have been frivolous because Juror 78 stated that she would try to do the best she could and did not manifest any bias or hostility toward Neal.

¶5 The circuit court found that counsel was familiar with the law in the area of juror bias. The court found that counsel considered the issues relating to Juror 78, read the voir dire transcript and decided not to raise the issue. The court concluded that counsel's performance was not deficient. We agree.

¶6 Counsel made a strategic decision not to pursue the Juror 78 issues on appeal. This strategic decision will be upheld as long as it was based on knowledge of the facts and the law. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). We conclude that the facts and the law support counsel's assessment of the issues relating to Juror 78.

¶7 A prospective juror who is either subjectively or objectively biased should be removed for cause. *See* ***Oswald***, 2000 WI App 2 at ¶17. A juror is subjectively biased if the record reflects that he or she "is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge …." ***Id.*** at ¶19. The circuit court makes the determination by assessing the juror's verbal responses to voir dire questions and the juror's demeanor. *See* ***id.*** A prospective juror is objectively biased if "a reasonable person in the prospective juror's position objectively could not judge the case in a fair and impartial manner." ***Id.*** at ¶25 (citation omitted).

¶8 Juror 78 was first questioned by the prosecutor:

> Q … You are now aware that this is going to be a murder charge, first-degree murder and reckless endangerings, 2 counts, total of 3 counts. Is there anybody that has any problem for whatever reason and I have had people that had some religious convictions that conflicted with sitting as a juror, physical problems, any reason at all where they feel they would not be able to sit on this kind of a trial? Past experiences or something happened to a relative? Yes ma'am? Number 78?
>
> A I don't think I could handle this.
>
> Q Are you willing to expound just a little bit on that? What do you think you would have trouble with, ma'am?
>
> A It's just frightening. It scares me.
>
> Q If you had to sit as a citizen and accept and listen to this, would you be able to come to a decision?
>
> A I don't know if I could or not.
>
> Q Are you frightened of anybody in this room or frightened in a general sense?
>
> A In a general sense.
>
> Q For your personal safety?
>
> A In a general sense of what happens, you know.

¶9 The prosecutor then asked the prospective jurors whether any of them had strong feelings about guns:

> Q … Is there anybody that takes a very strong position against guns or against handguns. For example, somebody that feels so strongly you might have a bumper sticker no guns or somebody that may have contributed money to get guns off the streets kind of program or something. Number 78, you feel very strongly?
>
> A Yes, I'm very much against guns and violence with guns.
>
> Q I'm sorry?
>
> A I say I'm very much against violence with guns.

¶10 Neal's counsel then questioned Juror 78.

> Q You indicated—2 things I need to follow up on. First, you indicated you didn't believe you could decide this case; is that correct?
>
> A Yes.
>
> Q You have to speak up so everything can be taken down.
>
> A Yes.
>
> Q And is that based on—I could barely hear you. I heard you say you were frightened; is that correct?
>
> A Yeah. Guns and shooting and killing people scares me.
>
> Q You understand that that is what they're charged with. We're here to determine if they actually did that; do you understand that? Those are the allegations.
>
> A Yeah.
>
> Q But that's fear such that you would have a problem listening to the evidence?
>
> A Probably not listening to it, but I don't know if I'm going to sleep well or rest well with it.
>
> Q Would you be able to render a verdict based upon what you hear here only, leave out your fear and leave out the other anxiety that you feel? Can you leave that out and make a decision as a juror based upon the evidence that the state presents and the evidence that we present?
>
> A I would like to think so, yes.

Q You'd like to think so? Are you sure?

A I would hope so, yes.

Q So if the evidence indicated that my client was not guilty of this offense, would you be able to return that verdict, understanding the way you feel?

A Yes, I guess I would.

Q You also indicated that you were anti-violence and guns. I think a lot of people, most people should or are anti-violence or guns. Is your feeling such that it would interfere with your ability to listen to the evidence here? Is it of such a magnitude you couldn't listen?

A I'm not sure. I guess maybe I could listen to it, yes.

Q I can't hear you. I'm sorry?

A I said yes, I guess I could listen to it.

Q The point I'm trying to get you [sic] is would your feelings and your fears and concerns interfere with your ability to be a juror in this case, because that is what I was hearing the first time?

A No, I guess not.

Q But you would have difficulties afterwards as a result of the trial?

A Yes.

¶11 Thereafter, Neal's counsel asked the panel whether they or a family member or friend had been the victim of a gun-related crime. Juror 78 responded that her niece had been fatally shot twenty years earlier.

Q Is there something about that experience that—I'm sure it's very traumatic.

A It was.

Q Is there—that something that still wrestles in the back of your mind and your heart?

A Like I say, I don't like violence with guns.

Q Based upon that experience and your feelings, would you prefer not [to] sit on this trial?

A Yes.

¶12 The court then stated:

> Let me tell you something. If I asked every one of these juror members if they prefer not to be on this jury, they'd all tell me yeah, I'd prefer not to be on the jury. That's not the standard. The standard is, ma'am, there is a lot of folks here who would just as soon be doing something else and not listening to this case, but the question is whether you can listen to the evidence and again decide. You people only decide the facts in this case. Nobody, there is nobody in this room that likes people who shoot people or people who commit violence against people. Nobody in this room likes anybody. The question is whether these individuals did certain things that they're charged with, and all you're to do is decide the facts. Will you be able to do that? Listen to the evidence that you hear and decide according to the evidence of what happened in this case?
>
> JUROR: I will try very hard.
>
> [DEFENDANT'S COUNSEL]: Judge, her primary issue is that she has a niece that was killed.
>
> THE COURT: That may be. I've already made a ruling. She's acceptable. Go ahead.

¶13 From the foregoing voir dire, we conclude that counsel and the circuit court correctly assessed whether Juror 78 should be stricken for cause. Although trial counsel and the court had to question Juror 78 extensively to get at the root of her concerns about the trial, she ultimately stated that she would "try very hard" to decide the case based on the evidence, notwithstanding her fears and misgivings. Juror 78 indicated that she was sincerely willing to set those aside.

¶14 Although the court did not make specific findings relating to subjective bias, the findings are implicit in the court's refusal to strike Juror 78 for cause and in the court's close questioning of Juror 78 as to whether she could decide the facts based on the evidence in the case. *See* ***Hintz v. Olinger***, 142 Wis. 2d 144, 149, 418 N.W.2d 1 (Ct. App. 1987) (where the circuit court did not make specific findings of fact, we may assume on appeal that such findings of fact were made implicitly in favor of its decision). We conclude that the record supports a

finding that Juror 78 was not subjectively biased, *see* ***Oswald***, 2000 WI App 2 at ¶¶19-20, and appellate counsel was not deficient for failing to pursue this issue on appeal, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996).

¶15 The voir dire also indicates that Juror 78 was not objectively biased. The juror expressed general concerns about violence but did not express a specific opinion or ingrained attitude about the specific case. *See* ***Oswald***, 2000 WI App 2 at ¶¶25-26. The circuit court's implicit finding that Juror 78 was not objectively biased is supported by the record, *see* ***id***., and appellate counsel was not deficient for failing to pursue this issue on appeal, *see* ***Rothering***, 205 Wis. 2d at 678.

¶16 Finally, we note that counsel is required to exercise professional judgment in selecting the issues to be raised in a criminal appeal and is not required to raise every nonfrivolous issue suggested by the client. *See* ***Jones v. Barnes***, 463 U.S. 745, 754 (1983). Counsel exercised that judgment relating to Juror 78 and was not ineffective for doing so.[3]

By the Court.—Order affirmed.

[3] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Management of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1977) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.